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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PACIFIC GREYHOUND LINES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review so much of the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above cause on July 28, 1937 (R. 405), as denies in part the petition of the National Labor Relations Board for the enforcement of its order against the Pacific Greyhound Lines, Inc., made pursuant to the National Labor Relations Act.

OPINIONS BELOW

The findings of fact and the order of the National Labor Relations Board are not reported but may be found at pp. 377–399 of the record. The

opinion of the Circuit Court of Appeals (R. 400) is unreported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 28, 1937 (R. 405). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether—upon a finding that respondent instituted, formed and sponsored a labor organization of its employees, dominated and interfered with its administration, and contributed financial and other support to it, contrary to Section 8 (2) of the National Labor Relations Act—the National Labor Relations Board has the power under said Act, in addition to ordering respondent to cease and desist from such interference, to order respondent (a) to withdraw all recognition from said organization as the representative of its employees for purposes of collective bargaining and (b) to post notices stating that such organization is so disestablished and that respondent will refrain from any such recognition thereof.

This question is the same as that raised by the Board's petition for certiorari, filed this term, to review the decision of the Circuit Court of Appeals

for the Third Circuit in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.* (No. 413).

STATUTE INVOLVED

The statute involved is the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C. Sup. II, Title 29, Sec. 151 *et seq.*). The pertinent provisions are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> (2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *
>
> * * * * * * *
>
> SEC. 10. (c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the

Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

STATEMENT

Upon charges filed by the Brotherhood of Locomotive Firemen and Enginemen, a labor organization, the National Labor Relations Board—pursuant to Section 10 (b) of the National Labor Relations Act—issued and served upon respondent, through its Regional Director at San Francisco, on May 29, June 10 and July 8, 1936, respectively, a complaint, an amended complaint and a second amended complaint, together with notices of hearing (R. 374, 11).[1] The second amended complaint alleged that respondent had engaged in certain un-

[1] The amended complaint differed from the original complaint only in one minor particular, not material here. The second amended complaint consolidated with the original proceeding another proceeding against the same company which had been instituted in another Region (see R. 12).

fair labor practices affecting interstate commerce, contrary to the provisions of Section 8, subdivisions (1), (2) and (3) of the National Labor Relations Act (R. 11–19). Beginning July 23, 1936, a hearing was held before a Trial Examiner duly designated by the Board (R. 375).

On August 25, 1936 the Trial Examiner filed an Intermediate Report, in which he found that respondent had engaged in the unfair labor practices charged (R. 376). Respondent filed no exceptions to this Report (R. 376). On December 18, 1936 the Board issued its findings of fact and order (R. 377–399).

The Board found, in substance, that respondent operated a motor bus transportation system in interstate commerce (R. 377, 378); that respondent, contrary to Section 8 (1) of the Act, had urged, persuaded and warned its operators not to join the Brotherhood of Locomotive Firemen and Enginemen and had threatened them with discharge if they joined or remained members of that organization (R. 380–382); and that respondent had discharged two employees because of membership and activities in the Brotherhood, contrary to Section 8 (3) of the Act (R. 382–392). In addition the Board found that in 1933 respondent had established an organization of its employees known as the Drivers' Association, Pacific Greyhound Lines (R. 392); and that respondent was dominating and interfering in various ways with the administration

of this organization and was contributing financial and other support to it, contrary to Section 8 (2) of the Act (R. 392–396).

Upon the basis of these findings the Board ordered respondent to cease and desist (1) from discouraging membership in the Brotherhood or any other labor organization, or encouraging membership in the Drivers' Association or any other labor organization, by discriminating against its employees in regard to hire, tenure or terms of employment; (2) from dominating or interfering with the administration of the Drivers' Association, or with the formation or administration of any other labor organization of its employees, and from contributing financial or other support to the Drivers' Association or any other labor organization; (3) from in any other manner interfering with, restraining or coercing its employees in the exercise of their rights to self-organization and collective bargaining (R. 398). In addition, paragraph (2) of the Board's order required respondent to offer reinstatement with back pay to the two employees unlawfully discharged, and further required that respondent (R. 399):

> (c) Withdraw all recognition from the Drivers' Association, Pacific Greyhound Lines, as the representative of its operators for the purposes of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work; and completely dis-

establish the Drivers' Association, Pacific Greyhound Lines as such representative;

(d) Immediately notify each and every one of its officers and agents in each of its divisions as well as each and every one of the representatives of the Drivers' Association, Pacific Greyhound Lines, that the Drivers' Association, Pacific Greyhound Lines is so disestablished and that it will refrain from any recognition thereof;

(e) Post notices to its operators in conspicuous places in all of its terminals on each of its divisions stating: (1) that the Drivers' Association, Pacific Greyhound Lines, is disestablished as the representative of its operators for the purpose of dealing with it with respect to grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, and that it will refrain from any recognition thereof; (2) that it will cease and desist in the manner aforesaid; and (3) that such notices will remain posted for a period of at least thirty (30) consecutive days from the date of posting.

On February 1, 1937, the Board, pursuant to Section 10 (e) of the Act, petitioned the Circuit Court of Appeals for the Ninth Circuit for enforcement of the foregoing order (R. 2). On July 28, 1937, the Circuit Court entered its judgment enforcing the order in part but declining to approve or enforce subdivisions (c) and (d), and

clause (1) of subdivision (e), of paragraph (2) (quoted above).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that subdivisions (c) and (d), and clause (1) of subdivision (e), of paragraph (2) of the Board's order were unauthorized by the Act.

(2) In refusing to enforce and in setting aside subdivisions (c) and (d), and clause (1) of subdivision (e), of paragraph (2) of the Board's order.

REASONS FOR GRANTING THE WRIT

The issue in this case is the same as that presented in the petition for certiorari in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, No. 413, already on file. The reasons for granting the writ, as set forth in the *Pennsylvania Greyhound* petition, are equally applicable here and need only be briefly summarized.

I. The decision of the Circuit Court of Appeals is untenable and in conflict with the decisions of this Court in *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, and *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515.

The question presented is one of statutory construction. Does the Act authorize the National Labor Relations Board to require the withdrawal of recognition, as a bargaining representative,

from company-dominated organizations not freely chosen as the representative of the employees? That the Board has such power appears clearly from (a) the language of the statute, (b) its legislative history, and (c) the rulings of this Court in the *Texas & New Orleans* and *Virginian* cases.

(a) The Board is expressly authorized by the Act, upon a finding that any person has engaged in an unfair labor practice, to include in its order a requirement that such person "take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." (Sec. 10 (c).) The Board found, and the finding was upheld by the court below, that respondent had established the Drivers' Association, dominated and interfered with its administration, and contributed financial and other support to it. The Association, accordingly, was not the freely chosen representative of respondent's employees; nor would it attain such a status upon the cessation of affirmative acts of interference by respondent. Since the Association was established and existed only by reason of respondent's unlawful acts, continued recognition of the Association as the representative of respondent's employees would perpetuate the effect of the unlawful conduct, seriously hamper the free selection of representatives by the employees, and discourage the growth of genuine collective bargaining. As the Board found, disestablishment of

the Association as the employees' representative was the only effective means of wiping out the effects of respondent's unfair labor practices and assuring to the employees the full freedom in the choice of representatives guaranteed them by the Act. The Board's order requiring withdrawal of recognition and disestablishment is therefore clearly warranted by the language of the statute authorizing the Board to "take such affirmative action * * * as will effectuate the policies of this Act."[2]

(b) The report of the House Committee on Labor shows definitely that Section 10 (c) was intended to authorize the Board to compel employers to refrain "from bargaining with an organization corrupted by unfair labor practices." (H. Rep. 972, 74th Cong., 1st Sess., page 21.)

(c) In the *Texas & New Orleans* and the *Virginian* cases, this Court enforced the Railway Labor Act (which did not contain statutory authorization as specific as that in Section 10 (c) of the National Labor Relations Act) by ordering withdrawal of recognition and disestablishment of company-dominated unions. The Railway Labor Act, as construed in the *Texas & New Orleans* case,

[2] "Withdrawal of recognition" and "disestablishment" mean only that respondent is required to cease dealing with the Association as the bargaining representative of its employees. The order does not direct the dissolution of the Association nor prevent it from establishing in the future, by appropriate showing before the Board, that it has become the free and uncoerced choice of respondent's employees.

was the chief precedent for the National Labor Relations Act, and there can be no question that the latter Act was intended to authorize use of the sanctions approved by this Court in the *Texas* case.

The reasoning of the court below in this case differs somewhat from that of the Third Circuit in the *Pennsylvania Greyhound* case. In this case it was held that the requirement of withdrawal of recognition and disestablishment of the Drivers' Association was "not germane to the complaint before the Board and consequently was not involved in the proceeding and was unauthorized" (R. 402).

The court below misconceived the scope of Sections 8 (1) and 8 (2), under which the Board was proceeding. Those sections prohibit interference with the employees' right of self-organization and with their right to bargain collectively through representatives of their own choosing. The action of the Board was germane to those sections, rather than to Section 9 (c), under which the court indicated that the Board ought to have been proceeding. Section 9 (c) provides election machinery for determining the choice of representatives as between *freely chosen* contestants, qualified to represent the employees. Here no question arises under that section, inasmuch as the Drivers' Association is not the freely chosen representative. The Board was seeking to establish the basic rights of self-organization and free selection of representatives without which the

machinery of Section 9 (c) can have no significance. It found that the continued recognition by respondent of its own *alter ego*—brought into existence by its own unlawful conduct—would discourage the development of genuine self-organization and representation. The action which it took was, therefore, appropriate under Sections 8 (1) and 8 (2).

This is demonstrated by the analogy of the Railway Labor Act and the *Texas & New Orleans* case. The Railway Labor Act of 1926 (before the 1934 amendments) simply forbade "interference, influence, or coercion" by the employer with his employees' right of self-organization (44 Stat. 577, Sec. 2, Third), but imposed no enforceable obligation to bargain collectively. It thus contained the equivalent of Sections 8 (1) and 8 (2) (though stated in general language), but not of Sections 9 (c) or 8 (5). Nevertheless this Court upheld the order of the District Court, which disestablished the company-dominated union in order to effectuate the prohibition of interference and coercion in Section 2, Third.

The court below adverts to the fact that the Drivers' Association was not formally notified of the hearing in this case (R. 402). The same argument was made in the *Pennsylvania Greyhound* case, and the matter is discussed in the petition for writ of certiorari filed therein. The contention has even less substance here, inasmuch as a leading official in the Drivers' Association was actually

present and testified at the hearing (R. 290, 291; see also R. 279).

II. The question raised by the decision below is of paramount importance in the administration of the Act. About one fourth of the charges of unfair labor practices filed with the Board involve the issue of company domination of labor organizations (First Annual Report of the National Labor Relations Board (1936), page 34). In such cases the Board has repeatedly ruled, as in the case at bar, that an employer found to have established and dominated a labor organization must withdraw recognition from such organization.* Unless the Board is permitted to exercise this power—plainly granted to it by Congress—to remove all traces of company interference and domination, the purposes and policies of Sections 8 (1) and 8 (2) will be frustrated.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Ninth Circuit should be granted.

STANLEY REED,
Solicitor General.

CHARLES FAHY,
General Counsel,
National Labor Relations Board.

OCTOBER, 1937.

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*The Board had, up to October 1, 1937, made the same ruling in twenty-two other cases, in addition to the instant case.